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No. 90-608

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; and GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

v.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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SUMMARY OF ARGUMENT

I. The newly adopted Wisconsin obscenity statute draws the line between unprotected

material which is tolerated, and unprotected material which is prohibited, with constitutionally sufficient specificity.

The statute does not depart in any constitutionally significant way from the test for obscenity enunciated by this Court in Miller v. California. It faithfully follows the prescribed formula, except that it does not apply to sexual conduct which is simply simulated.

Although the statute could have been written more precisely in this respect, the Wisconsin Legislature's choice to proscribe material which "describes or shows" the "commission" of specified sexual acts, without mentioning simulated acts, in contrast to the corresponding terminology in Miller which includes simulations, demonstrates that the legislature intended to limit the scope of the state law to material which involves the actual commission of sexual conduct.

This conclusion is corroborated by the legislative history of the provision. Contemporaneous legislative memoranda reveal that the word "simulation" was deliberately deleted from earlier drafts of an obscenity statute to change the definition of obscenity to include only the actual commission of sexual conduct. This purpose was verified by a member of the conference committee which put together the ultimately enacted statute, who stated that elimination of simulated conduct was one of the compromises that allowed the diverse factions in the legislature to finally agree on a mutually acceptable obscenity law after eight years of wrangling.

A restrictive interpretation is also consistent with the manifested purpose of the legislature that the statute be used to combat the obscenity industry, but never to harass or censor materials with serious value.

The legislature's decision to limit the application of the obscenity statute to the

actual commission of sexual conduct does not create further statutory ambiguity.

The pertinent question is not whether a writing, recording, picture or film itself is a simulation of sexual conduct, but whether the sexual conduct described or shown in these media is simulated or real. The statutory line between legal and illegal sexually explicit material is the line already existing between reality and pretense, a line the publishing industry itself uses to distinguish categories of material.

The problem, consequently, is not in discerning the line drawn by the statute between unprotected material which is prohibited, and unprotected material which is tolerated, but in determining in individual instances whether specific material falls on one side or other of the line.

The difficulty in determining the side on which particular material falls, however, is no reason to hold the language of an obscenity

statute too ambiguous to define the offense. Nor is it unfair to impose a risk on one who goes dangerously close to the line that he may cross it. The mere fact that persons may reach different conclusions about the same material does not deny the right to fair notice about whether it is forbidden.

One who nears the line drawn by the Wisconsin statute, moreover, is already well into the realm of material that could be considered criminal under established first amendment principles. A person who chooses to skate out to the edge of ice that has long since become constitutionally thin has little about which to complain.

In any event, it is not problematic to compel individual purveyors of sexually explicit material to make the same assessments the publishing trade routinely makes of whether the material describes or shows the actual commission of sexual acts. And it is no more problematic to compel anyone to make

this assessment than to force them to assess whether their material appeals to a prurient interest, is patently offensive under contemporary community standards, or has serious value for society.

And ultimately, any lack of clarity about the content of material must be resolved in favor of the disseminator because of the state's burden of proof in penal cases.

Applying these principles to the examples posed by the petitioners poses little difficulty.

It is not the function of the Supreme Court to mandate regulatory schemes for the states, or to question the wisdom of the schemes for regulating obscenity they have chosen. A state statute will be sustained if it does not violate the constitution.

The due process problem with the Wisconsin obscenity statute is simply that it does not declare as clearly as it could that it applies exclusively to the actual

commission of sexual conduct. But the words carefully used in the statute, considered in the context of the history and purpose of the provision, show that the legislature intended to impose that limitation on the law. And the parties to this litigation agree that the obscenity statute is limited to actual sexual conduct.

Under these circumstances, the existing trivial ambiguity is no reason for this Court to declare a newly enacted state statute unconstitutional. Before taking such a drastic step, the federal courts should give the courts of Wisconsin a reasonable opportunity to clarify the scope of the statute.

One type of case almost universally recognized as appropriate for abstention is that of a state statute, not yet construed by the state courts, which is susceptible of one construction that would render it free from federal objection, and another that would not.

Here, however, both possible constructions of the statute are free from constitutional taint since the first amendment permits the states to proscribe both actual and simulated obscene acts. A state court need only authoritatively decide which kind of obscene acts are proscribed. This case, consequently, is even more appropriate for federal abstention than the recognized paradigm.

This Court should deny review, and allow the state courts to restrictively construe the state obscenity law the way the legislature intended, and thereby avoid the objection that it is unconstitutionally vague.

II. The different statutory treatment of different distributors of obscene material does not deprive the members of any class of equal protection.

The constitutional validity of the statutory classifications must be assessed by applying the traditional rational basis test.

The exemption for schools and libraries is rationally related to the legitimate state interest in protecting institutions of learning from harassment by persons seeking to use the obscenity law to censor works with serious value by the threat of prosecution.

The Wisconsin Legislature was as much concerned about protecting the free flow of ideas and preventing censorship of serious works as it was about combatting the obscenity industry. In Wisconsin, as elsewhere in the nation, there is periodic pressure on schools and libraries to purge their collections of constitutionally protected material which some consider morally or otherwise offensive. And the lawmakers could justifiably fear that, although obscenity litigation would not likely succeed, these institutions might succumb to a mere threat of litigation to avoid public controversy, lingering hostility and expenditure of scarce resources. Because unwarranted threats could be aimed at both

commercial and noncommercial activities of these institutions, both kinds of activity could reasonably be deemed to need protection.

The legislature could determine, on the other hand, that schools and libraries deal so little in material which is actually obscene, and engage in so little commercial activity of any kind, that the impact of their exemption on the efforts to combat the obscenity industry would be negligible. The legislature could reasonably conclude, therefore, that an effective balance between the battle against obscenity and the danger that protected material could be an innocent casualty of the battle requires that all activities of schools and libraries be insulated from efforts to misuse the obscenity statute for censorship and harassment.

The same balance does not obtain, though, for book and video dealers since they are more likely to be involved in the commercial dissemination of material which is obscene,

and are less prone to harassment and censorship by overzealous citizens.

The cases which have considered similar justifications for exempting schools and libraries from the sanctions of obscenity statutes have upheld them as rational means of protecting artistically and educationally valuable material from public censorship. None of the several authorities which have been unable to find a rational basis for such exemptions have considered the justification expressed by the Wisconsin Legislature.

The exemption for contract printing is rationally related to the state's legitimate interest in protecting the free flow of ideas from all socio-economic strata of society.

This exemption is not based merely on the fact that printers who occupy this segment of the trade lack editorial control over the material they reproduce, but on the fact that their declination to exercise editorial control allows them to print prepared

materials inexpensively, giving low and moderate income persons access to a means of disseminating their protected speech. If liability for failure to inspect were imposed on these printers, their services would necessarily become more expensive, effectively putting printing beyond the reach of the poor.

The kind of low cost, offset service offered by mostly local contract printers is not likely to be used by the obscenity industry to mass produce their glossy magazines. The legislature could have decided, therefore, that it would be better to tolerate the printing of no more than a modicum of obscene material, and thereby preserve the free flow of ideas from those with marginal access to any media, than to prohibit the printing of all obscene material, and thereby censor the dissemination of legitimate ideas by the less economically advantaged of this state.

The legislature could have concluded, consequently, that it was necessary to classify contract printers differently from others lacking editorial control over material, such as store clerks or movie projectionists, who did not share their unique role in making the first amendment right to disseminate ideas a practical reality for those who would otherwise be silenced by their poverty.

Any exemption from the obscenity statute found to be unconstitutional, moreover, could be severed, leaving a fully operative, valid law.

ARGUMENT

I. THE WISCONSIN OBSCENITY STATUTE DRAWS THE LINE BETWEEN UNPROTECTED MATERIAL WHICH IS TOLERATED, AND UNPROTECTED MATERIAL WHICH IS PROHIBITED, WITH CONSTITUTIONALLY SUFFICIENT SPECIFICITY.

A. The Language Of The Statute, Considered In The Context Of Its History And Purpose, Shows That It Applies To Material Which Describes Or Shows The Actual Commission Of Enumerated Sexual Acts.

It is important to keep in mind that this litigation involves a state obscenity statute which has not yet been enforced, and which the state courts have never had an opportunity to construe. That statute is the product of a legislative compromise, reached after eight years of wrangling, following the invalidation of its predecessor in State v. Princess Cinema, Inc., 96 Wis. 2d 646, 292 N.W.2d 807 (1980).

The attorney general recognizes that the newly cast statute, not surprisingly, still

has some rough edges. But the prohibitions intended by the Wisconsin Legislature are not so cryptic as to require a federal court to invalidate their agreement as unconstitutionally vague before the Wisconsin courts have applied their clarifying rasp.

The statute does not depart in any constitutionally significant way from the test for obscenity enunciated in Miller v. California, 413 U.S. 15, 24 (1973). Compare Wis. Stat. § 944.21(2)(c) and (d) (1987-88). The major difference between them is only that the statute does not go as far as Miller would permit, see id., 413 U.S. at 25, in banning certain kinds of offensive sexual material.

The parties appear to fully agree that the statute faithfully follows the formula of Miller, except that it does not apply to sexual conduct which is simply simulated. It applies, rather, to "a writing, picture, sound recording or film which . . . describes or

shows . . . the commission of" specified sexual acts. § 944.21(2)(c) and (e).

Although the statute could have been written more precisely in this respect, the kind of material the Wisconsin Legislature intended to prohibit, and the kind it intended to tolerate, can reasonably be discerned by comparing this language with the selected terminology in Miller the drafters chose to change.

In Miller, the Court ruled that the states could define sexual conduct to include both actual and simulated sexual acts. Id., 413 U.S. at 25. Any reference to simulated acts is conspicuously absent, however, from the Wisconsin statute's definition of sexual conduct. See § 944.21(2)(e).

Miller said that material is constitutionally obscene when it "depicts or describes" sexual conduct in a patently offensive way. Id., 413 U.S. at 24. The statute says that material is proscribed as

obscene when it "describes or shows" sexual conduct in a patently offensive way. § 944.21(2)(c)2 and (d)2. The difference, though slight, is important.

"Depict" means "represent," which in turn means to take the place of or portray, to serve as a symbol, counterpart or image. American Heritage Dictionary at 383, 1049 (2d college ed. 1982); Webster's Ninth New Collegiate Dictionary at 340, 1000 (1984). One recognized meaning is to act the part of. Webster's Ninth New Collegiate Dictionary at 1000. "Depict," therefore, connotes the notion of simulation, of mere playacting.

"Show," on the other hand, means to cause to be seen or viewed, to manifest, reveal or demonstrate. American Heritage Dictionary at 1134; Webster's Ninth New Collegiate Dictionary at 1091. "Show" connotes displaying the real thing.

By substituting "show" for "depict," consequently, the legislature indicated that

it intended to limit the scope of the state law to materials which involve real rather than simulated sexual conduct.

The same inference can reasonably be drawn from another change in the Miller phraseology. Miller suggested that sexual conduct could be defined in terms of "representations or descriptions" of particular sexual acts. Id., 413 U.S. at 25. As noted before, the word "representation" connotes simulation.

The Wisconsin obscenity statute does not use that word in its definition of sexual conduct. Instead it defines sexual conduct to mean the "commission" of particular sexual acts. § 944.21(2)(e).

"Commit" means to do, perform or perpetrate, to carry into action. American Heritage Dictionary at 298; Webster's Ninth New Collegiate Dictionary at 265. Its use in the Wisconsin definition suggests that sexual

conduct means particular sexual acts which are actually done or performed.

The parties' agreed reading of the statutory language is corroborated by the scant but instructive legislative history of the provision.[1]

In a memorandum to State Representative Marlin Schneider dated March 2, 1988, Pam Russell, a staff attorney with the Wisconsin Legislative Council, described the changes in the then-pending obscenity bill, 1987 Senate Bill 31, made by a substitute amendment drafted by the council staff. Appendix at 1-2.[2] Among other things, Russell noted that

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[1]If the words of a statute could be interpreted to support either of two meanings, a court should turn to legislative history to clarify the legislature's intent. Dixson v. United States, 465 U.S. 482, 491 (1984).

[2]A memorandum prepared by a staff member of the legislative council to accompany legislation drafted by the staff is indicative of legislative intent. See State v. Vonesh, 135 Wis. 2d 477, 486, 401 N.W.2d 170, 175 (Ct. App. 1986).

the definition of obscenity was changed by "[d]elet[ing] from the definition of sexual conduct the term 'simulation of' so that only depictions of actual commission of the various types of sexual conduct would be covered." Id. at 1.

A memorandum to State Senator Walter John Chilsen from Jane Beyer, an analyst with the Legislative Fiscal Bureau, describes the same change in the scope of the proposed law. Appendix at 3-6.

Although the particular bill to which these memos referred never became law, the absence of the word "simulated" from the obscenity statute which was enacted in a special session of the legislature three months later, see § 944.21(2)(e), convincingly implies, in light of the contemporaneous explanations of the effect of this omission, that the legislature intended that only the "actual commission of the various types of

sexual conduct would be covered" by the enacted law.

This conclusion was verified by State Representative Robert Welch, a member of the conference committee which put together the ultimately enacted statute, who stated in a later affidavit that elimination of simulated sexual conduct was one of the compromises which allowed the diverse factions in the Wisconsin Legislature to finally agree on a mutually acceptable obscenity law. Appendix at 7-8.[3]

This restrictive interpretation of the definition of obscenity is consistent with the manifested purpose of the legislature to have

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[3]The remarks of a single conferee concerning the interpretation of a statute are entitled to weight when consistent with the language and history of the law, Monterey Coal Co. v. Federal Mine Safety and Health Review Comm., 743 F.2d 589, 596 (7th Cir. 1984) (and cases cited), although post passage remarks are worthy of less weight than contemporaneous statements. Butler v. United States Dept. of Agriculture, 826 F.2d 409, 414 n.6 (5th Cir. 1987).

the obscenity statute "used primarily to combat the obscenity industry [but] never . . . used for harassment or censorship . . . against materials or performances having serious artistic, literary, political, educational or scientific value." § 944.21(1).[4] Since artistically meritorious material is more likely to portray only simulations of sexual conduct, while actual sexual acts are likely to be committed in plainly pornographic works, the legislature could well have chosen, in the spirit of compromise, to exclude simulated conduct to reduce the prospect of employing the obscenity statute to censor serious works of art.

And even if the intent of the legislature to limit the scope of the statute was not

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[4]If several interpretations of a statute are possible, a reviewing court should find the one which is most harmonious with the manifested purpose of the legislature, considering the circumstances of the enactment of the legislation. Commissioner of Internal Revenue v. Engle, 464 U.S. 206, 217 (1984).

adequately demonstrated by the process of statutory construction, the rule of lenity would apply to compel a strict construction. Tanner v. United States, 483 U.S. 107, 131 (1987); Dixson v. United States, 465 U.S. 482, 491 (1984).

B. The Difficulty In Determining Whether Individual Material In Fact Describes Or Shows The Actual Commission Of Sexual Acts Does Not Make The Legal Boundary Of The Proscribed Conduct Any Less Clear.

The legislature's decision to limit the application of the obscenity law to the "actual commission of the various types of sexual conduct" does not create further statutory ambiguity.

It is true, as the petitioners argue, that in one view "all verbal descriptions of sexual conduct are simulations." Petition for Writ of Certiorari at 8. By the same token, though, so are photographs and films. Neither

words nor pictures are themselves sexual acts. Both are merely implements for capturing the images of acts, and conveying them to those who have not observed their occurrence.

This reflection on the metaphysics of description is not relevant to the issue on this petition, however, because the Wisconsin obscenity statute does not focus on the medium, but on the message. The pertinent question is not whether the writing or recording or picture or film itself is a simulation of sexual conduct, but whether the sexual conduct described or shown in the writing, recording, picture or film is simulated or real.

Similarly, the necessary question is not merely whether the deeds described or shown by the material are actually sex acts of the kind enumerated by the state law, instead of innocuous conduct, but whether the material describes or shows the actual commission of those acts, instead of simply simulating them.

The line adopted by the legislature between legal and illegal sexually explicit material is the line already existing between reality and pretense. Furthermore, it is the natural line already adopted by the publishing industry itself between what it calls "male sophisticate" material and what it calls "explicit" material. City of Urbana ex rel. Newlin v. Downing, 43 Ohio St. 3d 109, 539 N.E.2d 140, 149 (1989).

The problem is not in discerning the line drawn by the statute between unprotected material which is prohibited, and unprotected material which is tolerated, but in determining in individual instances whether specific material falls on one side or the other of the demarcated line.

Obviously there will be particular situations in which it will be difficult to determine whether the material describes or shows persons really performing sexual acts, and is therefore forbidden, or only the

pretended performance of sexual acts, and is therefore allowed. The Court has consistently held, however, that lack of such precision does not render obscenity statutes unconstitutionally vague. Hamling v. United States, 418 U.S. 87, 111 (1974).

"Wherever the law draws a line there will be cases very near each other on opposite sides." United States v. Wurzbach, 280 U.S. 396, 399 (1930). "'"That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language [of an obscenity statute] too ambiguous to define a criminal offense."'" Hamling v. United States, 418 U.S. at 111 (quoting Roth v. United States, 354 U.S. 476, 491-92 (1957)). Accord Miller v. California, 413 U.S. at 28 n.10. "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk

that he may cross the line." Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

"The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." Miller v. California, 413 U.S. at 26 n.9. The mere fact that prosecutors, police or the purveyors of the material themselves may reach different conclusions about it does not mean that the constitutional right to fair notice is denied. See id.

It must be remembered, moreover, that the line drawn by the Wisconsin statute is not between protected and unprotected expression, but merely between two forms of unprotected obscenity. See City of Urbana ex rel. Newlin v. Downing, 539 N.E.2d at 149. See generally Miller v. California, 413 U.S. at 25 (sexual conduct may be defined to include both actual and simulated acts). One who nears the line drawn by the Wisconsin statute, consequently,

is already far into territory that could appropriately be considered criminal. By drawing the line of proscription well within the realm of obscenity, the legislature has significantly eliminated any conceivable unfairness to those who choose to skate out to the edge of ice that has long since become constitutionally thin.

If the petitioners think that the reality or simulation of the sexual conduct is "hardly the type of fact that should determine criminal liability," Petition For Writ of Certiorari at 9, they are completely free under the statutory scheme to draw the line for their own purposes, as Miller did, to include both actual and simulated acts. Then they never need worry about whether their obscene books and videos are the kind which are tolerated because the obscene conduct is only simulated, or the kind which are proscribed because the obscene conduct is actually committed.

But certainly it is not problematic to compel particular purveyors of sexually explicit material to make the same assessments that the publishing trade routinely makes of whether their wares describe or show the actual commission of sexual acts. Cf. City of Urbana ex rel. Newlin v. Downing, 539 N.E.2d at 149.

And certainly it is no more problematic to compel purveyors of sexually explicit material to assess factually whether their wares describe or show the actual commission of sexual acts than to force them to assess judgmentally whether or not the material appeals to a prurient interest, is patently offensive under contemporary community standards, or has serious value for society. See generally Miller v. California, 413 U.S. at 24 (stating test for obscenity). Yet the compulsion of those assessments does not offend the requirement of fair notice. Id. at 27.

And ultimately, any lack of clarity regarding the reality of the sexual conduct in a particular case must be resolved in favor of the person alleged to have violated the law by disseminating material describing or showing the actual commission of sexual conduct. The State of Wisconsin must prove every element of a criminal offense beyond a reasonable doubt, Turner v. State, 76 Wis. 2d 1, 10, 250 N.W.2d 706, 711 (1977), and every element of a civil offense having a criminal counterpart by clear, satisfactory and convincing evidence. City of Cudahy v. DeLuca, 49 Wis. 2d 90, 93, 181 N.W.2d 374, 375 (1970). If it does not appear to the required degree of certitude that material describes or shows the actual commission of sexual conduct, no one can be punished for disseminating obscene material. See Miller v. California, 413 U.S. at 26.

Applying these principles to the examples posed by the petitioners presents little difficulty.

A recording such as 2 Live Crew's As Nasty as They Wanna Be plainly would not be proscribed since it merely makes references to sexual parts and practices. See Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 591-92 (S.D. Fla. 1990). Although the recording "depicts sexual conduct in graphic detail," id. at 592, it does not "describe" the "actual commission" of the acts to which it refers.

On the other hand, an unartistic, offensively prurient "play-by-play account of [an] author's recollection of sexual intercourse" he actually committed, see Kois v. Wisconsin, 408 U.S. 229, 231 (1972), would be prohibited.

Pictorial depictions of sexual acts which do not unequivocally show that the acts are actually being committed because portions of the bodies of the participants are undiscernible or obscured, could not be

prosecuted. See City of Urbana ex rel. Newlin v. Downing, 539 N.E.2d at 149.

An obscenity statute construed to apply only to the actual commission of sexual conduct is not unconstitutionally vague.

C. This Court Should Allow The Wisconsin Courts To Construe The New Obscenity Statute In A Manner Consistent With The Agreed Intent Of The Legislature.

This Court has repeatedly emphasized that its function is not to mandate for the states specific schemes regulating obscenity. Ward v. Illinois, 431 U.S. 767, 769 (1977); Miller v. California, 413 U.S. at 25. The examples given in Miller, 413 U.S. at 25, of material a state could define as obscene were only that. Ward v. Illinois, 431 U.S. at 773. And the states remain free to define obscenity less inclusively than the constitution allows. See id. at 774.

Nor should this Court consider the wisdom of adopting a scheme less inclusive than Miller suggested. See, e.g., Caban v. Mohammed, 441 U.S. 380, 392 n.13 (1979). The due process clause does not empower a federal court to weigh the wisdom of state legislation. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978). A statute is presumed to be valid, and will be sustained, regardless of its wisdom, if it does not violate the constitution. E.g., INS v. Chadha, 462 U.S. 919, 944 (1983).[5]

The due process problem with the obscenity statute as presently written is only that it does not declare as clearly as it could that it applies exclusively to the actual commission of sexual conduct.

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[5]This is not to concede that the line drawn by the Wisconsin Legislature was unwise. Politically, it was Solomonic. Any line can look unwise, moreover, when similar situations falling immediately on each side are compared. Considering the legislative purpose to protect even arguably serious works, the line was drawn in an appropriate place.

But as explained previously, the words carefully used in the statute, considered in the context of the history and purpose of the provision, show that the Wisconsin Legislature intended to impose that limitation on the scope of the law. And the parties to this litigation agree that the statute is limited to actual sexual conduct.

Under these circumstances, the existing ambiguity is no reason for any federal court, much less the highest one, to declare a newly enacted state statute unconstitutional. Before taking such a drastic step, the federal courts should give the courts of Wisconsin a reasonable opportunity to authoritatively clarify the reach of the new law.

The doctrine of abstention has its detractors, but also vigorous defenders, and after falling into judicial disfavor two decades ago, is once again solidly established. Waldron v. McAtee, 723 F.2d

1348, 1351 (7th Cir. 1983) (and authorities collected).

Even now, of course, abstention from the exercise of federal jurisdiction is the exception rather than the rule. City Investing Co. v. Simcox, 633 F.2d 56, 60 (7th Cir. 1980) (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976)). But abdication of the duty to decide cases can be justified in exceptional circumstances in which resort to the state courts would clearly serve an important countervailing interest. Id. (quoting Colorado River Water Conservation District v. United States, 424 U.S. at 813, and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

> "'The paradigm of the "special circumstances" that makes abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question.' Kusper v. Pontikes, 414 U.S. 51, 54,

> 94 S.Ct. 303, 306, 38 L.Ed.2d 260 (1973); see Zwickler v. Koota, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); Harrison v. NAACP, 360 U.S. 167, 176-177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Of course, the abstention doctrine 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.' Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965). But when the state statute at issue is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question,' id., at 535, 85 S.Ct. at 1182, abstention may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication,' id., at 534, 85 S.Ct. at 1181."

Id. (quoting Babbitt v. United Farm Workers National Union, 442 U.S. 289, 306 (1979)).

"'One type of case almost universally recognized as appropriate for abstention is that of a state statute, not yet construed by the state courts, which is susceptible of one

construction that would render it free from federal constitutional objection and another that would not.'" Waldron v. McAtee, 723 F.2d at 1352 (quoting Friendly, Federal Jurisdiction: A General View, 93 (1973)). The federal courts should avoid adjudicating such a statute unconstitutional because that determination would be "'predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.'" Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (quoting Moore v. Sims, 442 U.S. 415, 428 (1979)). "'Such a decision not only is a waste of judicial resources but provokes a needless collision between state and federal power.'" Waldron v. McAtee, 723 F.2d at 1352 (quoting Friendly at 93).

The present circumstances offer an even more compelling case for abstention than the recognized lady and the tiger paradigm.

Unlike that paradigm, a court which is afforded the opportunity to construe this statute would not be required to choose between one constitutionally felicitous and another constitutionally perilous alternative. The first amendment permits the states to proscribe patently offensive representations of actual or simulated sexual conduct. Miller v. California, 413 U.S. at 25.[6] To avoid the constitution objection, a construing court need only determine whether the Wisconsin statute applies exclusively to one kind of

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[6]Because the present constitutional objection implicates only unprotected material, abstention would not raise concerns about interference with the plaintiffs' first amendment rights. See generally, e.g., Almodovar v. Reiner, 832 F.2d 1138, 1140-41 (9th Cir. 1987) (discussing propriety of abstention when statute affecting first amendment rights might be narrowed to make it inapplicable to protected activity).

proscribable conduct, or to both. Unlike the paradigmatic situation, therefore, either possible construction would solve the federal constitutional problem.

In these circumstances it is not just reasonably possible, but virtually certain that any subsequent construction of the statute by the state courts would discredit a federal decision that the statute was unconstitutionally vague, rendering that declaration advisory and this litigation meaningless. Meanwhile, though, that tentative declaration would provoke unnecessary friction between federal and state sovereigns, and interfere with the ability of the state to enforce its criminal laws.

When federal plaintiffs fail to present their constitutional objections to an unconstrued state statute in the state courts, the federal courts "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the

contrary." Pennzoil Co. v. Texas, Inc., 481 U.S. at 15.

The Wisconsin courts consider it their duty to construe legislative acts attacked as unconstitutional, State v. Roth, 115 Wis. 2d 163, 166, 339 N.W.2d 807, 808 (Ct. App. 1983) (quoting State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wis. 2d 32, 46-47, 205 N.W.2d 784, 792-93 (1973)), including statutes attacked as unconstitutionally vague. See, e.g., State v. Popanz, 112 Wis. 2d 166, 172, 332 N.W.2d 750, 753 (1983).[7]

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[7]In State v. Princess Cinema, Inc., the Wisconsin Supreme Court refused to further construe the former obscenity statute because that enactment contained no standards for enforcement, and the court believed it was inappropriate to establish a complete regulatory scheme through the process of judicial construction. Id., 96 Wis. 2d at 659-61, 292 N.W.2d at 814-15. While it was unwilling to completely redraft a naked obscenity statute in the face of prolonged legislative silence, however, the court reaffirmed its obligation to interpret a comprehensive legislative effort to regulate obscenity. Id.

This Court should allow the Wisconsin courts to undertake the task that, in the circumstances presented here, is appropriately theirs to perform. It should allow them to construe the Wisconsin obscenity statute, as it indisputably should be construed, to avoid the objection that it is unconstitutionally vague.

II. THE DIFFERENT STATUTORY TREATMENT OF DIFFERENT CLASSES OF DISTRIBUTORS OF OBSCENE MATERIAL DOES NOT DEPRIVE THE MEMBERS OF ANY CLASS OF EQUAL PROTECTION.

A. The Constitutional Validity Of The Statutory Classifications Must Be Assessed By Applying The Traditional Rational Basis Test.

Ordinarily, legislative classifications will be upheld if they are rationally related to a legitimate governmental purpose. Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983); Clements v. Fashing, 457 U.S. 957, 963 (1982). Classifications are subject to

strict scrutiny, and upheld if necessary to promote a compelling governmental interest, only when they burden a suspect class or interfere with the exercise of a fundamental constitutional right. Id.

Classifications which interfere with the constitutionally protected right to freedom of speech are subject to strict scrutiny. Regan v. Taxation With Representation, 461 U.S. at 547. But as most courts have recognized, not all speech is protected by the constitution.

It has long been settled that obscenity is not protected by the first amendment. Miller v. California, 413 U.S. at 23; Roth v. United States, 354 U.S. at 485. Thus, classifications which do not discriminate among different kinds of protected speech, cf. Carey v. Brown, 447 U.S. 455 (1980), or separate legitimate from illegitimate speech, cf. Speiser v. Randall, 357 U.S. 513 (1958), but merely treat one group of distributors of unprotected obscene speech differently from

another group of distributors of unprotected obscene speech, do not interfere with the exercise of any protected right. E.g., Ripplinger v. Collins, 868 F.2d 1043, 1049-50 (9th Cir. 1989); United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir.), cert. denied, 480 U.S. 922 (1987); Piepenburg v. Cutler, 649 F.2d 783, 787 (10th Cir. 1981); Pollitt v. Connick, 596 F. Supp. 261, 267 (E.D. La. 1984); U.T., Inc. v. Brown, 457 F. Supp. 163, 166 (W.D.N.C. 1978); 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190, 192 (1986); State v. Baker, 11 Kan. App. 2d 4, 711 P.2d 759, 762-63 (1985) (and cases collected); 400 East Baltimore Street, Inc. v. State, 49 Md. App. 147, 431 A.2d 682, 694 (1981), cert. denied, 455 U.S. 940 (1982); Commonwealth v. Ferro, 372 Mass. 379, 361 N.E.2d 1234, 1236-37 (1977); Pack v. City of Cleveland, 1 Ohio St. 3d 129, 438 N.E.2d 434, 438 (1982); Long v. 130 Market Street Gift and Novelty, 294 Pa. Super. 383, 440 A.2d 517, 523-24 (1982); State

v. Lesieure, 121 R.I. 859, 404 A.2d 457, 463 (1979); State v. Hunt, 660 S.W.2d 513, 517 (Tenn. Crim. App. 1983), cert. denied, 466 U.S. 944 (1984).

The classifications attacked in this litigation must be assessed, therefore, under the traditional rational basis test. Id.

That test allows states considerable leeway to enact legislation which may appear to affect similarly situated people differently. Clements v. Fashing, 457 U.S. at 962-63; Parham v. Hughes, 441 U.S. 347, 351 (1979). Legislators are ordinarily presumed to have acted constitutionally, and the distinctions they deem desirable need only be drawn in such a manner as to bear some rational relationship to a legitimate state interest. Clements v. Fashing, 457 U.S. at 963; Parham v. Hughes, 441 U.S. at 351.

> "'If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or

> because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 [(1911)]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 [(1913)]. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 [(1961)].' Dandridge v. Williams, 397 U.S. [471,] 485 [1970]."

Bowen v. Gilliard, 483 U.S. 587, 600-01 (1987). Accord Clements v. Fashing, 457 U.S. at 963.

B. The Exemption For Schools And Libraries Is Rationally Related To The Legitimate State Interest In Protecting Institutions Of Learning From Harassment By Persons Seeking To Use The Obscenity Law To Censor Works With Serious Value.

The Wisconsin Legislature, knowing full well the constitutional problems presented, has chosen to exempt directors and employees

of schools and public libraries from liability under the state obscenity statute. § 944.21(8).

The question presented by this choice is not whether the legislature decided wisely to make the obscenity statute less comprehensive than it might have been, but whether its considered decision to immunize certain institutions from the same penalties as others for commercially disseminating obscene material was rational.

The fact that it took eight years after the old obscenity statute was struck down in State v. Princess Cinema, Inc., to enact a new one demonstrates that the legislature did not take its task lightly. It was as much concerned about protecting the free flow of ideas and preventing censorship of works having serious literary, artistic, political, scientific and educational value as it was about combatting the obscenity industry. § 944.21(1). And it is no secret that in

Wisconsin, as elsewhere in the nation, there is periodic pressure on schools and libraries to purge their collections of unqualifiedly serious works which some individuals or groups consider morally or otherwise offensive.

An article in the Milwaukee Journal, Sept. 26, 1988, at 4B, col. 1, Appendix at 9, reported the results of a survey showing that more than one hundred books were attacked in Wisconsin schools and libraries during the years since the Princess Cinema decision in 1980 left the state without an enforceable obscenity law. During these years in which the legislature was debating whether to enact a new statute, challenges were made in almost every Wisconsin county, and included a complaint about a volume of the World Book Encyclopedia of Science. Id.

A national survey of censorship efforts against schools and libraries during the 1988-89 academic year, reported in the Milwaukee Journal, Sept. 10, 1989, at 7J, col.

1, Appendix at 10, showed that Wisconsin was among the many states in which books continued to be challenged. Materials which were subject to objection included not only the perennial targets, Of Mice and Men, Slaughterhouse Five and Catcher in the Rye, but also such seemingly innocuous works as The Wizard of Oz and the comic strip, Garfield. Id. Nearly half the reported challenges resulted in either removal of the material or restrictions on its availability. Id.

Wisconsin lawmakers could reasonably conclude they did not want an obscenity statute to be used as a tool by pressure groups to harass public institutions into censoring plainly protected materials under the threat of prosecution. They could justifiably fear that, although such litigation would not likely succeed, these institutions might succumb to avoid the public controversy, lingering hostility and expenditure of scarce resources even an

unsuccessful prosecution would involve. See § 944.21(8)(a).

Since unwarranted pressure could be brought to discontinue any commercial as well as noncommercial dissemination of protected material some groups found objectionable, the lawmakers could reasonably decide to exempt both the commercial and noncommercial activities of vulnerable institutions to free them from the exacerbated harassment which could be provoked by the new enactment.

In addition, the legislature could reasonably fear that would-be censors would use the prospect of liability for commercial dissemination of obscenity to harass schools and libraries by arguing that their lending activities were commercial because they purchased their books and paid their employees, or because they received tax support. Such arguments would not likely prevail in litigation any more than an argument that Catcher in the Rye is obscene.

The danger that the mere threat of litigation for alleged commercial activity, regardless of the reality of success, might lead to suppression or restriction of protected material with serious value justifies an exemption for commercial activity.

The obscenity statute is aimed primarily at commercial distribution of obscene material, moreover, § 944.21(1), (3), and the legislature could determine that schools and libraries deal so little in material which is actually obscene, and engage in so little commercial activity involving any kind of material, that the impact of their exemption on the efforts to combat the obscenity industry would be negligible.

The legislature could reasonably conclude, consequently, that the danger to the free flow of valuable ideas if schools and libraries were included among those subject to prosecution for distributing obscenity far outweighed the danger from any commercial

distribution of obscenity if they were excluded. They could reasonably conclude that an effective balance between the battle against obscenity and the danger that protected material could be an innocent casualty of that battle required that all activities of schools and libraries be insulated from efforts to misuse the obscenity statute to harass these institutions, and censor works with serious value.

This balance does not obtain, however, for book and video stores.

Although these dealers also promote the free flow of ideas in society, they do not promote the flow for free. They, much more than schools or libraries, are engaged in the commercial dissemination of material. At least some stores, moreover, those euphemistically specializing in "adult" material, are more likely to deal in material which is legally obscene. These inherently commercial enterprises, therefore, present a

significantly greater danger of commercial dissemination of obscene material.

In addition, book and video dealers have been much less prone to harassment and censorship by citizens who seem to consider tax supported institutions and employees necessarily subservient to their personal tastes. Not many have tried to pull John Steinbeck's novels or Judy Garland's movies from stores where they are for sale. These private enterprises, therefore, face significantly less danger of being victimized by the opposing problem the legislature sought to avert.

Bookstores and video dealers are situated differently from schools and public libraries. And the legislature could properly treat them differently by exempting the one class but not the other from the obscenity statute.

The cases which have considered similar justifications for exempting schools and libraries from the sanctions of obscenity

statutes have upheld the classifications as rationally related to the legitimate state interest in protecting artistically and educationally valuable material from public censorship. 4000 Asher, Inc. v. State, 716 S.W.2d at 192-93; 400 East Baltimore Street, Inc. v. State, 431 A.2d at 691-94; Commonwealth v. Ferro, 361 N.E.2d at 1236-37; State v. Martin, 719 S.W.2d 522, 525 (Tenn. 1986). None of these cases limits its approval of the exemptions to the noncommercial activities of schools and libraries. See id.[8]

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[8]The exemption approved in Commonwealth v. Ferro expressly included a "'retail outlet affiliated with and serving the educational purpose of [the exempt] organization.'" Id., 361 N.E.2d at 1236.

The cases which rely on other justifications for approving school and library exemptions do not by and large limit their imprimaturs to the noncommercial activities of these institutions, except in those jurisdictions in which the obscenity statutes in question limit their exemptions in this way. E.g., Long v. 130 Market Street

(continued...)

None of the several authorities relied on by the petitioners which have been unable to find a rational basis for exempting schools and libraries from other obscenity statutes, Petition for Writ of Certiorari at 14, have considered the justification expressed by the Wisconsin Legislature for excluding schools and libraries from this statute. These authorities, therefore, are beside the point, and offer no support for the claim that the exemptions in § 944.21 are irrational as they apply to commercial activities of public institutions.

The exemptions, to the contrary, are rationally related to the legitimate state interest in protecting institutions having a public purpose from harassment by persons

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[8](...continued)
Gift and Novelty, 440 A.2d at 527-28. Other cases approve exemptions for all activities of institutions which by and large engage in noncommercial activities. M.S. News Co. v. Casado, 721 F.2d 1281, 1291-92 (10th Cir. 1983).

seeking to use the obscenity law to censor nonobscene works with serious social value. They do not deny equal protection, consequently, to persons or institutions denied their benefit.

C. The Exemption For Contract Printing Is Rationally Related To The State's Legitimate Interest In Protecting The Free Flow Of Ideas From All Socio-Economic Strata Of Society.

There is a rational basis for exempting contract printers from penal liability for "the printing of material that is not subject to the contract printer's editorial review or control." § 944.21(5m).

The exemption for contract printing is not based merely on the fact that printers who occupy this segment of the trade lack editorial review or control over the material they reproduce, but on the fact that their declination to exercise editorial control allows them to print prepared materials

inexpensively, giving low and moderate income persons and groups meaningful access to a means of disseminating their protected speech.

As noted previously, the Wisconsin Legislature was legitimately concerned with battling the obscenity industry, but not at all costs. § 944.21(1). It was equally concerned with "protecting the free flow of ideas," id., and "making available to all citizens . . . materials that reflect the cultural diversity and pluralistic nature of American society." § 944.21(8)(a).

The legislature could reasonably find, as the Wisconsin Supreme Court did earlier, that "contract printers . . . provide[] a quick and inexpensive printing service that by its low cost allows access to the print media by groups that would otherwise not find such access." Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 567, 297 N.W.2d 500, 507 (1980).

The reason for the low cost of the printing, and hence its availability to low and moderate income groups, is that contract printers typically accept material which has been written, edited, typeset and laid out by others, and merely reproduce it on their photo-offset printing machinery. Id. at 556-57, 567-68, 297 N.W.2d at 502, 507. Contact with the content of the material is negligible because there is no need for a contract printer to read or check the material in any way before it is reproduced. Id. at 568, 297 N.W.2d at 507.

The legislature, like the court, could have reasoned that:

> If liability for failure to inspect were imposed on printers like Port, they would of necessity become censors and their services would become more expensive. Increased costs might preclude the publication of small, low-budget newspapers. Such potential liability might also deter contract printers from contracting to print material they consider to be controversial. All of this would have a deleterious effect on the free dissemination of

> information which is fundamental in our society.

Id. at 567, 297 N.W.2d at 507.

Consistent with this reasoning, the statute is careful to specify that contract printers have immunity only for the "printing" of material which might be obscene. § 944.21(5m). Since "printing" includes only the reproduction of material in printed form, American Heritage Dictionary at 985, Webster's Ninth New Collegiate Dictionary at 935, this exemption does not permit the reproduction of films or of videotapes which are now becoming the dominant mode of presenting pornographic material. See generally 1 Attorney General's Commission on Pornography, Final Report, § 4.2.2 at 287-89 (1986).

The kind of low cost, offset service offered by mostly local contract printers, moreover, is not likely to be used by the obscenity industry to mass produce their glossy magazines. Contract printers,

consequently, could empirically be considered to present a minimal threat of becoming a cog in the obscenity industry.

The legislature could have reasonably decided that its purpose to prevent the printing of obscene material was outweighed in this instance by its purpose to protect the free flow of material with serious value to all segments of society. It could have decided that it would be better to tolerate the printing of perhaps a modicum of obscene material, and thereby preserve the free flow of ideas from those with marginal access to the media, than to prohibit the printing of all obscene material, and thereby effectively censor the dissemination of serious literary, artistic, political, scientific and educational ideas by the less economically advantaged of this state.

The legislature could have concluded, consequently, that it was necessary to classify contract printers differently from

others lacking editorial review or control over material, such as store clerks or movie projectionists, who did not share their unique role in making the first amendment right to disseminate ideas a practical reality for those who would otherwise be silenced by their poverty.

The exemption for contract printing is reasonably drawn to accommodate the important state interest in preserving the free flow of ideas from all its citizens without surrendering too much ground in its war against the obscenity industry.

D. Any Exemption From The Obscenity Statute Found To Be Unconstitutional Could Be Severed, Leaving A Fully Operative Valid Law.

> "[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act . . . contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is

> valid.'" The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987) (citations omitted).

The Wisconsin Legislature was given plain notice that exemptions would be constitutionally troublesome. It chose to include three of them anyway. But by adding that, "[t]he provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001(11)," § 944.21(10), the legislature evinced a clear intent that the substantive provisions of the statute should stand if any or all of the exemptions should be found unconstitutional.

The exemptions for schools, public libraries and contract printers are obviously independent of the substantive provisions of

the law. Severing the exemptions, therefore, would have no effect whatever on the nature of the statutory prohibitions.

If any of these exemptions are found to be unconstitutional, therefore, they should be severed in accord with the expressed intent of the legislature, leaving a fully operative law which could be enforced to fulfill the primary legislative purpose of fighting the obscenity industry.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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THOMAS J. BALISTRERI
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APPENDIX

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Room 147 North, State Capitol, Madison 53702
Telephone (608) 266-1304

DATE: March 2, 1988

TO: REPRESENTATIVE MARLIN D. SCHNEIDER

FROM: Pam Russell, Staff Attorney

SUBJECT: Description of Senate Substitute Amendment __ (WLCS: 337/1) to 1987 Senate Bill 31, Relating to Obscenity

Senate Substitute Amendment __ (WLCS: 337/1) to 1987 Senate Bill 31, relating to obscenity, makes the following changes to Senate Bill 31:

1. Specifies that the transactions subject to criminal penalties are only (a) enumerated transactions carried out for commercial purposes and (b) transactions involving minors.

2. Deletes advertising obscene material or an obscene performance as a transaction that may be subject to criminal prosecution.

3. Provides a statement of legislative intent that the authority to prosecute obscenity is to be used primarily to combat the obscenity industry and not to be used for harassment or censorship purposes and that enforcement should be consistent with constitutional free speech protections.

4. Makes the following changes in the definition of obscenity under the Bill:

a. Permits a court to consider whether the material or performance has serious educational value.

b. Deletes from the definition of sexual conduct the term "simulation of" so that only depictions of actual commission of the various types of sexual conduct would be covered under the definition of obscene.

(OVER)

c. Specifies that "community standards" under the definition of obscenity are statewide standards.

5. Requires that, prior to bringing a criminal action for a violation of the state obscenity law, the Attorney General must determine whether a criminal action shall be commenced.

6. Authorizes counties to adopt ordinances to prohibit conduct that is the same as the obscenity statute. The county is not required to consult with the Attorney General prior to bringing an action for violation of the ordinance.

7. Specifies that cities, villages and towns may not enact obscenity ordinances.

8. With regard to the requirement that a defendant must have knowledge of the character and content of the material or performance, specifies that the general definition of "knowledge" applicable throughout the Criminal Code (i.e., that knowledge only requires a belief that the actor believes that the specified fact exists) does not apply to the obscenity statute.

9. Creates an exemption from prosecution under the obscenity statute for employes, members of the board of directors or trustees of libraries and educational institutions, if those persons are acting in their official capacities.

10. Specifies that the provisions of the substitute amendment, including the exemption for libraries and educational institutions, are severable.

PR:kja;las

March 4, 1988

TO: Senator Walter John Chilsen
Room 40 South, State Capitol

FROM: Jane Beyer, Fiscal Analyst
Legislative Fiscal Bureau

SUBJECT: Senate Substitute Amendment WLCS 337/1 to Senate Bill 31

At your request, I am providing a summary of Senate Substitute Amendment WLCS 337/1 to Senate Bill 31, which would make a number of modifications to the bill relating to obscene materials and performances.

Definition of Obscenity

Under Senate Bill 31, obscene material would be defined to mean a writing, picture, sound recording or film which meets the following three criteria:

1. The average person, if he or she would apply contemporary community standards, would find the material appeals to prurient interests, if taken as a whole;

2. Under community standards, the material describes or shows sexual conduct in a patently offensive way; and

3. The material lacks serious literary, artistic, political or scientific value, if taken as a whole.

Obscene performance would be defined under SB 31 to mean a live exhibition before an audience which meets the following three criteria:

1. The average person, if he or she would apply contemporary community standards, would find the performance appeals to prurient interests, if taken as a whole;

2. Under community standards, the performance describes or shows sexual conduct in a patently offensive way; and

3. The performance lacks serious literary, artistic, political or scientific value, if taken as a whole.

The substitute amendment would specify that the "community standards" under the definitions of obscene material and performances would be statewide standards. The substitute amendment would further require that, in addition to a finding that the material or performance lacks serious literary, artistic, political or scientific value, if taken as a whole, it lacks educational value as well.

Senate Bill 31 would define sexual conduct to mean the commission or simulation of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals. The substitute amendment deletes from the definition of sexual conduct the term "simulation of" so that only depictions of actual commission of the various types of sexual conduct specified would be covered under the definition of obscene.

Types of Transactions Prohibited; Penalty

Under the provisions of Senate Bill 31, it would be a Class D felony to do any of the following with knowledge of the character and content of the material or performance: (1) import, print, advertise, sell, possess for sale, publish, exhibit or commercially transfer any obscene material; (2) advertise, produce or perform in any obscene performance; (3) possess obscene material with the intent to transfer or exhibit the material to a person under the age of 18 years; or (4) transfer or exhibit any obscene material to a person under the age of 18 years. Further, it also would be a Class D felony to require, as a condition to the purchase of periodicals, that a retailer accept obscene material. A Class D felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both.

The substitute amendment would delete advertising obscene materials or performances as transactions that could be subject to prosecution. The substitute amendment would limit the types of prohibited transactions involving obscene materials and performances to include only the enumerated transactions carried out for commercial purposes. The transactions involving minors, which would be prohibited under the bill, would also be prohibited under the provisions of the substitute amendment, regardless of whether they would be carried out for commercial purposes. The substitute amendment would provide that a violation of the obscenity statute is a Class D felony and further, would specify that each day a violation of the obscenity provisions continues would be a separate offense.

Legislative Intent

A statement of legislative intent is included in the substitute amendment which provides that the authority to prosecute obscenity is to be used primarily to combat the obscenity industry and is not to be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The

intent statement further provides that enforcement of the obscenity provisions should be consistent with constitutional free speech protections. Senate Bill 31 does not include a statement of legislative intent.

Knowledge Requirement

The provisions of Senate Bill 31 would apply to persons who engage in various actions involving obscene material or performances with knowledge of the character and content of the material or performance. Under a general statutory provision [s. 939.23(2)] relating to criminal intent, "know" is defined to require only that the actor believes that the specified fact exists. This statutory definition of knowledge would not apply to knowledge of the character and content of the material or performance under the substitute amendment.

Exemption from Prosecution for Libraries and Educational Institutions

The substitute amendment would create an exemption from prosecution under the obscenity statute for employes, members of the board of directors or trustees of libraries and educational institutions, if those persons are acting in their official capacities. Senate Bill 31 does not contain such an exemption.

Prosecutorial Authorization of the Attorney General

The substitute amendment would also create the requirement that, before any criminal obscenity law prosecution is commenced, the district attorney must submit the case for review by the Department of Justice. District attorneys could only begin prosecution with the authorization of the Attorney General. (It should be noted that the WLCS 337/1 draft appears to provide the authority to determine whether obscenity cases should be prosecuted to the Department of Justice generally, rather than the Attorney General specifically. The Legislative Reference Bureau draft of the substitute amendment to SB 31 clarifies this point to specify that it would be the responsibility of the Attorney General specifically to authorize such prosecutions.)

Local Regulation

The substitute amendment would allow counties to adopt ordinances to prohibit conduct that is the same as that conduct which would be prohibited under the state statute. Such ordinances could provide for a forfeiture not to exceed $10,000 for each violation. The county would not be required to consult with the Attorney General prior to beginning an action for violation of the ordinance. Further, the substitute amendment would specify that cities, villages and towns may not enact obscenity ordinances.

Severability of the Provisions

The substitute amendment specifies that the provisions of the substitute amendment, including the exemption for libraries and educational institutions, are severable.

Determinations Regarding Obscenity

Senate Bill 31 would require that a judge or jury examine pictures or passages in the context of the work in which they appear in determining: (a) whether the average person, if he or she would apply contemporary community standards, would find the material appeals to prurient interests if taken as a whole, and (b) whether the material lacks serious literary, artistic, political or scientific value, if taken as a whole, and is therefore, obscene. The substitute amendment would retain this provision.

I hope this summary is useful. Please contact me if I can be of further assistance.

JMB/all

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 88-C-657

WILLIAM H. KUCHAREK, et al.,

Plaintiffs,

v.

DONALD J. HANAWAY,

Defendant.

AFFIDAVIT OF STATE REPRESENTATIVE
ROBERT WELCH

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

ROBERT WELCH, being duly sworn, states on oath that:

1. He is a Wisconsin state representative and member of the Wisconsin Legislature.

2. He was a member of the conference committee which put together November 1987 Special Session Assembly Bill 10, which ultimately was passed and signed by the governor to become 1987 Wisconsin Act 416, creating the present Wisconsin obscenity statute, Wis. Stat. § 944.21 (1987-88).

3. One of the compromises agreed to by the conference committee was the elimination of simulations of sexual conduct from the scope of the bill.

4. The intent of the committee was to limit the scope of the obscenity statute to material which describes or shows the actual commission of sexual conduct.

ROBERT WELCH
State Representative

Subscribed and sworn to before me
this 20th day of June, 1989.

Notary Public, State of Wisconsin
My commission is permanent.

4 B THE MILWAUKEE JOURNAL Monday, September 26, 1988

Efforts to ban books rising, survey shows

Stevens Point, Wis. —AP— A professor who has studied censorship for more than 25 years says he sees an increase this year in efforts to ban books from public libraries and schools.

Lee Burress, a University of Wisconsin-Stevens Point English professor, said evidence from a fifth nationwide survey he is conducting suggests that there is an increase in the state and nation.

In a survey two years ago, Burress identified more than 100 books that have been challenged in Wisconsin since 1980.

Books have been attacked by concerned parents or adults in almost every county in Wisconsin, Burress said, but the state is about average when the number of banning attempts is compared with national averages.

He said Wisconsin's new anti-pornography law could mean a rise in book-banning attempts. The law, enacted in June, outlaws the sale or exhibition of hard-core obscene materials and provides for fines and jail terms.

Although the law exempts schools and libraries, Burress said he expected it would nonetheless encourage more frequent challenges of books on the shelves of public and school libraries.

Burress, a member of the Wisconsin Intellectual Freedom Coalition, testified against enactment of the law at public hearings earlier this year.

"The net effect will probably be chilling. I do think there will be more problems because of the law. Schools will be under more pressure," he said.

Burress said the most frequent reason cited by parents and groups who sought to ban books from schools was obscenity. He said the state's new law likely would be used by those groups.

Kathleen Huston, chairwoman of the Wisconsin Library Association's intellectual freedom committee, said she too feared the obscenity law would encourage more attempts to ban books from libraries.

"I think that it was a step backward for the state," she said.

Burress said recent examples illustrated a problem with book banning efforts, mainly that there is no clear definition of obscenity. "The general public uses that term in a very loose, sloppy way," he said.

The book "Working" by Studs Terkel was challenged by parents in Wales who objected to language they considered obscene.

In Evansville, a controversy erupted last year over "Woman's Body: An Owner's Manual." Parents said the book contained "filth" and was "sick."

Huston said the most recent complaint she received was about a book at an elementary school in Antigo. The book, "The Human Body," was a volume of the World Book Encyclopedia of Science used by third- and fourth-graders.

"There was concern," Huston said, "about a section of the book that dealt with the reproductive system. It had the typical color overlays of the male and female reproductive systems.

"The complaint was that the book would get the children too confused and frightened about something they were too young to understand," she said.

Burress said, however, that he is encouraged by the fact that most school boards in Wisconsin have established guidelines for dealing with complaints about books.

"It is a dangerous world out there," Burress said. "And I am sympathetic with parents who want to protect their kids. At the same time, I don't think you can protect them by preventing them from reading."

Would-be censors challenge libraries

By JOHN BARBOUR
Associated Press

More than 40 million public school children and 13 million college students have returned to their classrooms. But in many of these halls of learning, the shadow of censorship hangs over that source of light and knowledge, the library.

Freedom of speech and the press, to write and to read whatever you like, remains protected in America. But those freedoms are frequently challenged. Public and school librarians often feel under siege.

Books as seemingly harmless as Mark Twain's "Huckleberry Finn" and L. Frank Baum's "The Wizard of Oz" have been challenged. Some of the most frequent targets are John Steinbeck's "Of Mice and Men," Kurt Vonnegut's "Slaughterhouse Five" and J.D. Salinger's "Catcher in the Rye."

But, as the school board in Eliot, Maine, said in rejecting a parental request to ban Judy Blume's novel "Forever" as pornographic: "While you have the right to censor material for your child, we do not believe you have that right for other children in the system."

One report issued last month said religious extremists and right-wing organizations were gaining in their battle to ban or censor library books.

The report was by People For the American Way, an anti-censorship group founded by television producer Norman Lear. The organization's 7th annual report, "Attacks on the Freedom to Learn," said censorship and other ideological attacks on public education occurred in 42 of the 50 states, including Wisconsin.

The report said school libraries were the target of significantly more censorship attempts during the 1988-'89 school year, with more than half the challenges made against materials that are not required reading but are available in the library.

Nearly half the challenges covered by the report resulted either in removal of the material or in restrictions on its use, such as a requirement of prior parental consent.

In the 1986-'87 academic year, People For the American Way reported 153 attempts to remove books from public schools or libraries in 41 states, 37% of them successful.

Judith Krug, who writes and edits the American Library Association's Newsletter on Intellectual Freedom, chronicles those individuals and groups "who attempt to remove those materials from public availability and accessibility."

"This is a constitutional republic, but the constitutional republic does not work unless the electorate is enlightened," she said. "We are a nation of self-governors, but in order to make appropriate decisions we need to have information available and accessible."

Soon, authors and celebrities will visit bookstores and libraries across the country to read publicly excerpts from banned books, as they did when Salman Rushdie's "The Satanic Verses" raised such a furor.

In Los Angeles, for instance, PEN Center West, an author's group, will meet in Malibu for readings of banned books. Among the invited are Steve Allen, Alice Walker, Martin Sheen, Ray Bradbury, Hope Lange, Alvin Toffler, Larry King and Billy Crystal.

In the year ended May 1989, the American Library Association reported that more than 100 books were brought up on charges, including Jim Davis' "Garfield: His Nine Lives."

That cartoon book was challenged in Saginaw, Mich., by a parent who found some of the language and drawings offensive. Said Stephen James, assistant director for the Saginaw County Public Library, "It was intended to be a children's book. But some of the language was challenging."

A parent objected to one illustration Davis had captioned, "She stormed, she fumed, she kicked ass." The drawing depicts a woman kicking a man and sending him tumbling.

The library review committee decided to keep the book, but in the adult section.

It has been a rough time for James and the Saginaw libraries. They received 11 challenges from May to December 1988.

The Saginaw authorities reported to the library association: "Although no evidence of an organized censorship effort has been found as yet ... the sheer number of challenges placed a clear burden on the library and to many seemed to suggest further trouble."

Saginaw received a complaint because the Bible and books on Christianity were shelved with books on myths and other religions, but that is where the Dewey Decimal System places them.

What about a picture book for children — named "Where's Waldo?" — in which young readers scan through a busy page of a hundred or so small illustrations of tiny characters to find Waldo? He is either lost in the illustrations of people doing things at a track meet or a department store.

But among the illustrations, one woman found a little boy peeking under a curtain at a woman in a department store dressing room. As in the other cases, the review committee refused to ban the book.

And Saginaw was asked to remove a book called "Young, Gay and Proud," an anthology of short stories, poems and essays supportive of teenagers who have homosexual tendencies.

The complaint was filed by David A. Morel, the father of two young girls and a vice president of the 25-member Saginaw chapter of the American Family Association, a religiously oriented group based in Tupelo, Miss., formerly known as the National Federation for Decency.

Morel, a church-going Baptist, objected to the book on pornographic grounds.

The library reviewers rejected his appeal. "We felt, in fact, it was not enticing youngsters, that it was intended to promote a sort of healthy self-image and that in fact was a good thing to do once a person had made a personal decision," James said. "We decided to keep it in the collection."

It is only one of some 400,000 books in the five Saginaw libraries. But it is part of the diversity of books that can be found in any public library.

"Many Voices, Many Books: Strength Through Diversity" is the theme of National Banned Books Week, Sept. 23-30, sponsored by the library association. "There are a lot of ideas out there I don't agree with," said Krug, the association's guardian. "But I don't think you can fight ideas unless you know what they are. The solution to a bad idea is a good idea, and ideas do build on one another."

Libraries once practiced a concept of balance, both sides of a controversy. But those were simpler days, when there were only two sides. Things are so complex, opinions so varied, that librarians now embrace the concept of diversity.

At the base of many current censorship attempts is the Supreme Court ruling that upheld the right of a Missouri school board to censor a student newspaper. The extension of that ruling to school libraries is being tested in Florida.

Despite the constant battle to preserve the sanctity of the shelves, the passion for censorship continues unabated.

In Louisville, Colo., an elementary school banned Halloween when parents said it promoted devil worship. The ban was lifted when other parents protested that it was depriving their children of enjoyable activities.

But in North Pole, Alaska, named after Santa's home base, a school banned the use of the word Christmas in the holiday season on the basis that it violated the separation of church and state. The ban remains.